U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0403

DONALD L. McLAUGHLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (AVONDALE OPERATIONS)	)	DATE ISSUED: Aug. 17, 2015
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Attorney Fees and the Decision and Order Denying Petition for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor, United States Department of Labor.

Isaac H. Soileau, Jr. (Soileau & Associates, LLC), New Orleans, Louisiana, for claimant.

Richard S. Vale, Frank J. Towers and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Attorney Fees and the Decision and Order Denying Petition for Reconsideration (2011-LHC-02121, 02122) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). The amount of an attorney's fee award is discretionary, and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant obtained benefits under the Act for work-related injuries to his head, right wrist and back via a settlement agreement with employer. Claimant received a lump sum of $100,000 for disability benefits, as well as a Medicare Set-Aside to cover the costs of future medical care. Employer also authorized surgical treatment for left carpal tunnel syndrome. The agreement was approved by the administrative law judge, pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), on October 29, 2013. Subsequently, claimant's counsel sought an attorney's fee of $37,122.07 for services performed before the administrative law judge, representing 62.6 hours by Attorney Isaac H. Soileau, Jr., at an hourly rate of $250, 3.1 hours by Attorney Ryan Jurkovic at an hourly rate of $220, and 237.1 hours by paralegal John Helgason at an hourly rate of $80, plus costs and advances of $1,822.07.

After receiving the fee petition, the administrative law judge contacted claimant's attorney by email and recommended that he amend it in accordance with the administrative law judge's prior fee award in *Heyden v. Chet Morrison*, 2011-LHC-02140 (Nov. 13, 2013).[1] The administrative law judge specifically identified areas of concern such as duplicate entries, charges for intraoffice communications, and excessive billing. After employer filed its objections to the fee petition, the administrative law judge again emailed claimant's counsel and asked that he address the alleged deficiencies identified by employer. About six months later, after claimant's counsel averred he had not received the emails, the administrative law judge provided further opportunity for counsel to amend his fee petition. Counsel declined to do so, stating that there was "nothing wrong" with it.

In his decision, the administrative law judge denied counsel's fee petition in its entirety. The administrative law judge noted numerous errors in the recitation of the facts of the case, such as counsel's identifying the wrong administrative law judge and stating that a hearing had been held, when in fact the settlement proceeding was successful. The administrative law judge therefore questioned the petition's accuracy. He noted that counsel was given the opportunity to correct the deficiencies he had identified, but that counsel declined to do so. He further addressed employer's objections and found many of them meritorious. He then discussed case precedent under other fee-shifting statutes wherein an attorney's fee had been denied due to gross deficiencies in the application. The administrative law judge concluded that he had the authority to deny the fee application in its entirety on the facts of this case, as it was inaccurate and deficient, counsel's refusal to correct it was disrespectful, and judicial resources would be wasted were he forced to wade through it. Thus, the administrative law judge denied counsel an attorney's fee.

[1] The Board subsequently affirmed the administrative law judge's fee award in that case. *Heyden v. Chet Morrison, Inc.*, BRB Nos. 14-0090, 15-0127 (Feb. 27, 2015).

Claimant's counsel filed a motion for reconsideration with the administrative law judge. The administrative law judge addressed counsel's contentions at length, disputing counsel's recitation of the contacts between his office and counsel. The administrative law judge noted that counsel attempted to defend his petition, but had not addressed the administrative law judge's concerns. He concluded that "Counsel would not even meet the Court halfway by correcting the blatant errors [in the] initial paragraphs and entries related to an Internet sweepstakes . . . ." Decision and Order Denying Pet. for Recon. at 9. Thus, the administrative law judge denied the motion for reconsideration.

Claimant's counsel appeals the administrative law judge's denial of an attorney's fee. Employer responds, urging affirmance of the administrative law judge's orders. Claimant's counsel filed a reply brief in support of his appeal.

Counsel contends the administrative law judge abused his discretion in denying him any attorney's fee. Counsel avers that his fee petition conforms to 20 C.F.R. §702.132(a), that the administrative law judge erred in requiring that counsel amend his fee petition to conform to employer's objections, and that the administrative law judge lacks the authority to deny a fee entirely given that claimant successfully obtained a substantial settlement due to counsel's efforts. For the reasons that follow, we reject counsel's contention that the administrative law judge abused his discretion in finding the fee petition inadequate and in directing counsel to amend his fee petition. However, on the facts of this case, the administrative law judge's denial of any fee is too harsh a penalty given the degree of success.

The usual remedy for a fee petition that is incomplete, lacks specificity, or fails in any other way to meet the standards of the regulation at 20 C.F.R. §702.132,[2] is to

[2] Section 702.132(a) states:

> Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed (See 33 U.S.C. 928(c)). The application shall be filed and serviced upon the other parties within the time limits specified by such district director, administrative law judge, Board, or court. The application shall be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work. Any fee approved shall be

withhold a fee award until a complete, adequate statement is provided. *Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 5 BRBS 317 (5th Cir. 1977); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). The administrative law judge is entitled to determine whether and to what extent a fee petition is inadequate or incorrect, irrespective of whether employer files objections. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002); *Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994). If counsel fails to correct the deficiency, the administrative law judge may disallow the entries at issue. *Hudson*, 28 BRBS 334.

In this case, claimant's counsel refused the administrative law judge's requests to revise the fee petition based on counsel's belief that there was nothing wrong with it and because he was awaiting the Board's decision in *Heyden* concerning reductions the administrative law judge had made in that case. The administrative law judge found this explanation inadequate and explained in detail his rationale for going beyond employer's specific objections to deny a fee entirely. Decision and Order at 2-4, 6-13; Decision and Order Denying Pet. for Recon. at 1-5, 7-9. The administrative law judge stated that blatant errors on its face caused him to question the petition's validity. Noting it had taken him three weeks to decipher the fee petition in *Heyden*, he stated he should not have to expend limited judicial resources on a similarly deficient petition.[3]

> reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. No contract pertaining to the amount of a fee shall be recognized.

20 C.F.R. §702.132(a).

[3] The administrative law judge noted as examples: (1) billing for the preparation of a post-hearing brief, when no hearing was held; (2) billing for clerical work that is part of an attorney's overhead; (3) charges for communication among the attorneys and staff in counsel's office without a showing of necessity; and (4) the failure to comply with the Fifth Circuit's minimum billing requirement. *See Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Biggs*], No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished).

After discussing federal case law supporting the denial of an attorney's fee under the applicable statutes, the administrative law judge stated:

> Mr. Soileau's failures in his fee petition from start to finish, from naming the wrong judge and wrong course of proceedings in the introduction, to the inconsistencies in the amount per hour requested for himself and his staff, diminish the persuasiveness of the estimates in his fee petition and diminish the accuracy of the petition as a whole. Further, his insistence that nothing is wrong with the petition and not correcting its patent misrepresentations when requested to do so by the Court is utterly disrespectful. Also, this is not the first time Counsel has submitted inadequate fee petitions.

Decision and Order Denying Attorney Fees at 11. The administrative law judge concluded that counsel's "disregard for the fee petition process" wastes judicial and employer's resources and "undermines his hard-earned credibility." *Id*. at 12. Because counsel failed to present an adequate fee petition, the administrative law judge found that employer cannot be held liable for claimant's attorney's fees.[4]

Generally, fee awards under the fee-shifting provisions of Section 28 of the Act, 33 U.S.C. §928(a), (b), are calculated using the "lodestar" method, under which a reasonable hourly rate is multiplied by the number of hours reasonably expended on the litigation.[5] *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America, Inc.*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *see generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997). Where the documentation of the hours expended is inadequate, the administrative law judge may disallow the time requested. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Similarly, the administrative law judge may reject entries that reflect unnecessary work or are duplicative, vague, or incomplete. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319 (5th Cir.), *cert. denied*, 516 U.S. 862 (1995).

In this case, the administrative law judge did not abuse his discretion in rejecting counsel's fee petition. The administrative law judge rationally found, for reasons he discussed extensively, that the fee petition was inaccurate on its face, and therefore

[4] The administrative law judge also found that claimant cannot be liable for his own attorney's fee under Section 28(c), 33 U.S.C. §928(c).

[5] The definition of a "reasonable attorney's fee" is the same for all federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

inadequate.[6] Moreover, he appropriately gave counsel repeated opportunities to cure the defects. *See, e.g., Montanez v. Simon*, 755 F.3d 547 (7th Cir.), *cert. denied*, 135 S.Ct. 459 (2014); *Hudson*, 28 BRBS 334. Counsel simply refused. Counsel has therefore failed to establish an abuse of discretion or legal error in the administrative law judge's rejection of his fee petition.

Nonetheless, counsel obtained a $100,000 settlement and a Medicare set-aside for claimant. On the facts of this case, therefore, we find that it was not reasonable for the administrative law judge to deny counsel a fee entirely despite the inadequacy of the fee petition and the disrespect shown the administrative law judge. The denial of an attorney's fee is an extreme sanction and the degree of claimant's success militates against the imposition of this penalty in this case. *See Paynter v. Director, OWCP*, 9 BLR 1-190 (1986) (Ramsey, C.J., dissenting); *Bankes v. Director, OWCP*, 7 BLR 1-102 (1984), *aff'd*, 765 F.2d 81, 8 BLR 2-1 (6th Cir. 1985). Accordingly, we reluctantly vacate the administrative law judge's denial of an attorney's fee.[7]

On remand, the administrative law judge should award counsel a "reasonable" fee in relation to the results obtained. *Hensley*, 461 U.S. at 434-436; *see Avondale Industries, Inc. v. Davis*, 348 F.3d 487, 37 BRBS 113(CRT) (5th Cir. 2003); *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Baker*], 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *see also Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001). But the administrative law judge is not obligated to decipher counsel's inadequate fee petition in so doing, nor must he give counsel another opportunity to correct the petition. Instead, the determination of a "reasonable" fee in this case may be based on factors such as the results obtained, the issues involved in the case, the degree to which the case was contested and the parties engaged in discovery prior to settling, fee awards in similar cases, or any other relevant factors. *See generally Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646 (7th Cir. 1985); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc).[8] The administrative law judge must state the basis for the fee

[6] "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . ." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

[7] We note that the administrative law judge did not issue an order directing counsel to amend his fee petition. *See* 33 U.S.C. §927(b).

[8] In *Ohio-Sealy Mattress* and *Copeland*, the circuit courts affirmed the district courts' decisions to cut the proposed lodestar fee by a percentage when the fee petition was too vague or inadequately documented, or contained duplicative or unnecessary charges. The courts recognized the "impracticalities of requiring courts to do an item-by-

award, in order to permit appellate review. *Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127 (2001). We emphasize that this procedure is not to be the norm in cases arising under the Act; administrative law judges are not to abdicate their responsibility to review fee petitions. *See generally Sullivan*, 36 BRBS 127. Rather, we hold only that, due to the egregious and well-documented circumstances in this case, the administrative law judge's fee award need not be based on counsel's inadequate and uncorrected fee petition.

Accordingly, the administrative law judge's Decision and Order Denying Attorney's Fees and Decision and Order Denying Petition for Reconsideration are vacated, and the case is remanded for further proceeding in accordance with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

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item accounting." *Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127, 1150 (2001).